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Supreme Court of the United States.

OCTOBER TERM, 1902.

Office Supreme Court U. S.
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APR 28 1903
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No. 247.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, SHERIFF AND EX OFFICIO TREASURER OF WILKES COUNTY,

vs.

W. N. COLER & COMPANY.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

A. C. AVERY,
Counsel for Petitioners.

(18,411.)

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THE QUESTION IS ONE OF POWER OR AUTHORITY.

The appellants contend that the bonds are invalid unless authority is given expressly or by necessary implication in the charter and amendments (all of which are set forth in former brief of appellants) or in the code sections 1996 to 2000.

1 Dillon on Munc. Corp. (4th ed.), secs. 542, 549, 553.

Justice Douglas, delivering the opinion of the court and discussing the question whether the charter and amend-

ments vested authority in Wilkes county in Call *vs.* Commissioners of Wilkes, 123 N. C., at page 313, said:

*First. We do not see that any authority whatever is given or attempted to be given by these sections to Wilkes county to subscribe to the capital stock of this company. * * * It is evident that the legislature as well as the railroad itself thought that the authority given in the ordinance was not sufficient, as in both cases additional legislation was sought and obtained.*"

THE QUESTION IS WHETHER JUSTICE DOUGLAS ERRED WHEN HE SAID THERE WAS NO AUTHORITY IN WILKES COUNTY OR WHETHER THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THE CHARTER (EXHIBIT A) AND THE ACT OF 1879 (PAGE 19 OF FORMER BRIEF) VESTED AUTHORITY IN THE COUNTY. (SEE OPINION, PRINTED RECORD, AT PAGE 116.)

The opinion rests upon the idea that the power was granted by the mere location of the line, by the act of February 20, 1879, and that, though the direct provision, that the county could subscribe (section 4 of the act), was void, the same end was accomplished in the enactment of section 1, defining the route, though passed in the same defective manner.

The circuit court of appeals erred when it rested its opinion that the first section of the act of 1879 was as valid as a grant of power as if it had been enacted as part of section 13 of the charter on March 9, 1868 (printed Record, pp. 116 and 117), because—

1st. That would be to presuppose that no authority existed on February 19, 1879, and that on the 20th of February the legislature attempted to supply that power, but

failed to do so by the use of direct terms in section 4, because of a violation of the express mandate of the Constitution, rendering section 4 void, though the same end was accomplished by section 1.

If that be true, any charter enacted before 1868, and containing authority in terms for any county through which it may pass to make subscriptions to its stock, can be amended by providing for new lines in every direction and empower every county in the State to subscribe, though the amendments should not be passed in conformity to the Constitution, article II, section 14.

This would defeat the *purpose of the framers of the constitution to have the vote of every legislator recorded in the journals* upon questions whether municipalities or counties should be empowered to create debts except for necessary expenses.

2d. If the effect of the enactment were to engraft section 1 of the act of 1879 on to section 13 of the charter, the line actually built is not the line provided for in the act of 1879, *in that it does not pass through Jonesville or Wilkesboro, the only points west of Salem-Winston, named in the act, and in that it was entirely north of the Yadkin river, while both of those points lie south, and in that the map shows it follows the valley of the Yadkin (called by counsel nature's line) for only a few miles before reaching a terminus at North Wilkesboro,* whereas the act required the line to be located "up the valley of the Yadkin before reaching Jonesville."

A leading case in point is Sherwood *vs.* Lafayette Co., 3 Dillon C. C. R., 236, where it was held *that an amendment to a charter providing for a line south of the Missouri river did not vest powers given to counties north of said river by the charter.*

It would seem to follow that a road constructed north of the Yadkin river could not have the privilege of using a subscription to a branch which by law was to be built so as to pass directly by two points, one about six and the other over one mile south of the river. (See digest of that case.)

1 Dillon (4th ed.), page 642.

3d. The constitution of North Carolina, article V, section 4, limited the power of the State legislature after April 22, 1868, when it went into effect, to subscribe to the capital stock of railroads except such as were unfinished when the constitution was adopted and those in which the State then had a direct pecuniary interest.

The Chatham railroad was chartered before April, 1868, and the State had a direct pecuniary interest in it. (See brief, already filed, pp. 66, 67 to 69, and 72, 73.) By amendments enacted August 3, 1868, and thereafter (see former brief, Exhibit D, pp. 73, 74, 75, 76 to 81) it was provided that a branch might be built from the graded terminus (see act of August 3, 1868, p. 73) to "the South Carolina State line near Cheraw." The supreme court of North Carolina held that the Cheraw branch was not a part of the original line, but *between the termini of the route established by previous legislation was a new road.*

Galloway *vs.* Chatham R. Co., 63 N. C., at p. 158.

See extract from opinion former brief, p. 59.

The act of February 20, 1879, amended section 13 of charter by adding the "and one of which (branches) shall be constructed from Winston-Salem * * * which branch shall be known as the Second division."

The act twice calls it a branch, whereas the act of February 3, 1869, makes provision for the construction "of" the Yadkin Valley division of said railroad, running from Salem-Winston by way of Lewisville, thence by way of Yadkinville, in the county of Yadkin, to the foot of the Blue Ridge, in the county of Caldwell.

This line is not called a branch, but a division, like that from Greensboro to Salem, and is spoken of only as a division.

A direct line run by Yadkinville to the foot of the Blue Ridge at Coffey's Gap, three miles north of the line of Burke county, would pass through north Iredell, Alexander, and Caldwell counties, and would terminate at the lowest gap of the Blue Ridge on the east and opposite to the head of Watauga river, down which to Tennessee is the only practicable line to the northwestern boundary of the State, in Watauga county, on the west side.

"*Nature's* line," directly west from Wilkesboro, is notoriously an impracticable one, and, as shown by experimental surveys of three companies, *would run against insurmountable precipices.*

THE BLUE RIDGE GEOGRAPHY.

Mt. Airy, the terminus of one branch, is near the foot of the Blue Ridge, which runs southwest. Wilkesboro is within fifteen miles of the Blue Ridge on the north, within thirty of Patterson, on the west, and Patterson is within five miles of the foot of Blue Ridge.

The only gap from Mt. Airy to the southern boundary of Caldwell, where grading has been done, is Coffey's Gap, three miles north of the Burke County line. This is matter of uni-

versal knowledge in North Carolina, appearing from legislation and judicial annals. These local matters are known to and considered by the State tribunal. A line from Winston-Salem to Coffey's Gap would not touch Wilkes county, but would pass through Iredell, Alexander, and Caldwell.

MISTAKE OF COUNSEL FOR APPELLEES.

Cotton Mills *vs.* Waxhaw does not sustain the contention of counsel that it is so far constitutional as indirectly to confer power, as appears from the following extract from the opinion:

"*We have repeatedly held that this section is mandatory and not directory, and that a failure to comply with its provisions is fatal to any statutory authority to levy a tax or create a debt* (Bank *vs.* Commissioners and Commissioners *vs.* Snuggs, *supra*; Thrift *vs.* Elizabeth City, 122 N. C., 31; 44 L. R. A., 427; City of Charlotte *vs.* Shepard, 122 N. C., 602; Mayo *vs.* Commissioners, 122 N. C., 5; 40 L. R. A., 163; Commissioners *vs.* Call, 123 N. C., 308; Commissioners *vs.* Payne, *ibid.*, 432; Commissioners *vs.* De Rosset, and Black *vs.* Commissioners, *supra*)."

Rodman Heath Cotton Mills *vs.* Waxhaw, 130 N. C., at pp. 294, 295.

Article II, section 14, is set forth in full in the opinion, and the foregoing extract applies it to the case of an act incorporating a town. It is held clearly that an act passed in accordance with article II, section 23, may create a municipal corporation, *but it cannot, either directly or indirectly, clothe the municipality with power to create a debt.*

The amendment of February 20, 1879, if it had been an original charter, would not have empowered the corporation

to create the debt. Under the decision of the court cited, it can confer no greater power as an amendment than would have been granted had it been an original charter.

THE WORD "NEAR."

The decisions of the supreme court of North Carolina (cited former brief, pages 46 and 47), *it is conceded, hold that the word "near" is too indefinite to extend a line to the object near which it is to go.* The appellants are at a loss to understand *how this established rule* which prevails in settling the boundary lines of tracts of lands *should be declared inapplicable to railroad lines,* if railroad companies have no more privileges than natural persons. Suppose a line were run (under the act of 1869) through North Iredell, Yadkin, and Caldwell counties to the foot of the Blue Ridge at Coffey's Gap, this would pass through two counties contiguous to, adjacent to, or bounded by Wilkes county, but none of these descriptive words are used. Would such a line be "near" to Ashe, Surry, or Watauga county, because only one county intervenes? If so, how many counties must intervene before the word "near" ceases to apply? In the language of the court, "how near" must a county be—in 50, 100, or 200 miles? Can this court define "near" as a description of location?

"TO BE DETERMINED" BY WHOM—THE LEGISLATURE OR THE COMPANY?

Before the constitution of 1868 was ratified, April 24, 1868, a charter was a contract between the State and a railroad company, because the power to amend charters was first reserved in that constitution. By reference to former briefs, pages 60 to 65, and the acts there referred to as exhibits, it will appear that the legislature and the company acted on that idea.

The right to determine the route was reserved in the first section of the charter, to be determined by the legislature, with the assent by ratification of the company.

See 120 N. C., pages 624, 625.

Former brief, 65.

The legislature thought it must be so determined, and hence passed act of February 3, 1869, and attempted to pass act of February 20, 1879.

The route by Lewisville, Yadkinville, and to valley of Yadkin would run by upper valley of Lewis Fork, the main prong of the Yadkin, to Coffey's Gap. That entire line runs south of the Yadkin river till it passes Yadkinville.

The charter fixed the location of the first division through Forsyth, but nothing except the void law of 1879 mentioned Wilkes as a county through which any branch even should pass.

Upon questions of geography and topography the Federal courts are bound by the decisions of the Supreme Court.

Justice Douglass, for a majority of the court, after all of these *local questions* had received due consideration and after conceding the right of Forsyth county, concludes for the court that it could find no grant of authority to Wilkes county. Was not that court better advised as to these questions?

THE ACT OF JANUARY 3, 1872 (PAGE 16 OF FORMER BRIEF).

Section 4 of this act repealed "*all parts of ordinances* and of acts of the General Assembly of North Carolina making appropriations, * * * and all parts of such ordinances as are inconsistent with this act are repealed." (See page 18 of former brief.)

Section 8 of the charter ordinance of March 9, 1868, provided for appropriations. If the contention of counsel that this act repealed the provisions of the act of February 3, 1869, locating the Yadkin Valley division can be sustained, *it would follow that section 1 of the charter would also be repealed, and all authority which it confers would be annulled.*

IF FURTHER LEGISLATION WAS NOT NECESSARY TO EXTEND THE ROAD WEST, THEN THE LEGISLATURE, THE RAILROAD COMPANY, ACTING THROUGH ITS ATTORNEYS, THE COUNTY AUTHORITIES, AND THE SUPREME COURT OF NORTH CAROLINA MISCONSTRUED THE CHARTER.

Are all these opinions on a local question to be overruled? In Belo *vs.* Com'rs it was decided that the charter empowered Forsyth to subscribe, and power of no other county was passed upon.

In Comm'rs *vs.* Call it was held *that no such power was given to Wilkes county.* The Federal courts ought to lean towards the correctness of this distinction.

This inclination should be stronger, in view of the universal idea that the charter applied only to counties therein named as evidenced by action of the legislature, the company, the bar, and the county. The recital of the act of 1879 worked no estoppel, but it is none the less evident that the company and the county were advised that the legislative idea that additional legislation was necessary to confer power was correct.

REFLECTIONS ON JUSTICE DOUGLASS.

The charge, made in the circuit court, that Justice Douglass, who delivered the opinion in Commissioners *vs.* Call, *supra*, was disqualified by interest, was unwarranted. (See agreement as to facts insisted on for appellees, pages 94 and 95 of Record.)

By reference to these pages of the record, it will appear that counsel insisted that it should appear as a fact, first, that Mrs. Douglass, wife of the justice, brought an action to restrain the Northwestern North Carolina Railroad Company from issuing mortgage bonds, and that afterwards "R. M. Douglass, the justice who delivered the opinion of the court, * * * on behalf of his wife as a stockholder, forbade the sale of the franchise of said company and opposed the decree confirming it."

This attack was not only unjust and unwarranted, but the attack could not have been intended or expected to do more than create prejudice against the case of appellants.

Williams *vs.* Eggleston, 170 U. S., 304.

FURTHER ATTACK ON JUSTICE DOUGLASS BY APPELLEES.

By reference to page 94 of printed Record it will appear that Justice Douglass was assailed in the circuit court, and facts were found which might be ground of attack in higher courts, because the clerk failed to correct the copy of his opinion in Commissioners *vs.* Call, sent up in record in Turner *vs.* Commissioners, 173 U. S. The language stricken out may have been intended to call attention to the fact that the valid act of February 3, 1869, required the line to run through Yadkin county, but the accidental failure to correct the copy is explained by affidavits of the clerk of the supreme court, of his assistant, and of counsel. (See pages 106 and 107 of Record.)

COLLUSION.

Counsel for appellants have not heretofore noticed intimations that there was collusion, because it has been held that this court will not consider such matters.

Adams Ex. Co. *vs.* Ohio State Auditor, 165 U. S., 194.

But as this matter has been lugged in to prejudice the cause of appellants, petitioners, if with any definite object in view, appellants wish to say, first, that the "unilateral" quotation from the dissenting opinion was something unusual, but the failure of Mr. Hackett to appear or file brief, as he had leave to do, is easily explained. He was physically unable to attend the court and failed to file his brief, because before it was finished the same questions were exhaustively argued by one of the foremost law firms in the State in Commissioners *vs.* Payne at the same term.

THE VALIDITY OF THESE BONDS WAS CONTESTED IN A CASE WHERE A BONDHOLDER AND THE COUNTY WERE PARTIES.

Turner *vs.* Commissioners, 173 U. S., 461.

The evidence in the record shows that Call, the original defendant, was in collusion with the bondholders, instead of acting as a trustee for both parties. (See affidavit of T. C. Jennings, page 87 of Record.)

It appears also of record that the board of commissioners, who went out of office December, 1898, refused to pay the costs of defendants (see affidavits, pages 88, 89 of Record), and that subsequently Call, as treasurer, paid the costs of Turner's appeal and persuaded the new board to reimburse him. He had been sued as treasurer and would have been entitled to claim reimbursement, under the law of North Carolina, had he tested the question, instead of accepting the volunteer services of an attorney, who was a bondholder and did not wish the case to be heard on appeal by the supreme court of North Carolina.

TURNER AND WELLBORNE AS BONDHOLDERS.

When Call refused to appeal, Turner and Wellborne, being two of the largest taxpayers of the county, determined to test the question whether they were bound to pay tax to liquidate the debt. They could better afford to lose their single bond than to pay their proportions of the special tax, as appellants understood their position.

The appellees here, complainants below charged on information that they did not own a bond. Turner swore that they did own it. (See Record, page 92.)

A. C. AVERY,

Of Counsel for Petitioners.